

# WISCONSIN DEPARTMENT OF REGULATION & LICENSING



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STATE OF WISCONSIN  
BEFORE THE DENTISTRY EXAMINING BOARD

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IN THE MATTER OF DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	FINAL DECISION
	:	AND ORDER
JAMES M. D'AMICO, D.D.S.,	:	LS0806121DEN
RESPONDENT.	:	

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Division of Enforcement Case No. 05DEN161

The State of Wisconsin, Dentistry Examining Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Dentistry Examining Board

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 7<sup>th</sup> day of January, 2009.

Lori R. Barbeau DDS  
Member  
Dentistry Examining Board

STATE OF WISCONSIN  
BEFORE THE DENTISTRY EXAMINING BOARD

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IN THE MATTER OF THE DISCIPLINARY :  
PROCEEDINGS AGAINST : PROPOSED DECISION  
:  
JAMES M. D'AMICO, D.D.S., : Case No. LS# 0806121 DEN  
RESPONDENT. :

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Division of Enforcement Case #05 DEN 161

**PARTIES**

The parties in this matter under Wis. Stat. § 227.44 and for purposes of review under Wis. Stats. § 227.53 are:

James M. D'Amico, DDS  
1518 SE 42<sup>nd</sup> Terrace  
Cape Coral, FL 33904

Dentistry Examining Board  
P.O. Box 8935  
Madison, WI 53708

Department of Regulation and Licensing  
Division of Enforcement  
P.O. Box 8935  
Madison, WI 53708

**PROCEDURAL HISTORY**

This matter was commenced by the filing of a Notice of Hearing and Complaint on June 12, 2008. Attorney James Polewski appeared on behalf of the Division of Enforcement. The respondent, James M. D'Amico, D.D.S., did not file an Answer to the Complaint and did not appear at the hearing held in this matter on July 29, 2008.

Based upon the record herein, the Administrative Law Judge recommends that the Dentistry Examining Board adopt as its final decision in this matter, the following Findings of Fact, Conclusions of Law and Order.

**FINDINGS OF FACT**

1. James M. D'Amico, D.D.S., was born on October 13, 1952, and is duly licensed to practice dentistry in the State of Wisconsin license # 50001683, which was originally granted on June 25, 1976.
2. Respondent was licensed to practice dentistry in the State of Florida under license # DN 7121.
3. Respondent's most recent address on file with the Department of Regulation & Licensing is 1518 SE 42nd Terrace, Cape Coral, Florida 33904.
4. On January 31, 2005, the State of Florida Board of Dentistry revoked the license it had previously issued to

Respondent.

5. The basis for the Order revoking Respondent's Florida license was Respondent's conduct in four separate patient incidents. Respondent was found to have violated several provisions of Florida state law and administrative regulations governing the practice of dentistry, involving patient abandonment, fraud, improper dental treatment, negligent dental treatment, and failure to maintain required patient documentation.

6. Respondent appealed the Order of the Florida Board of Dentistry revoking his license to practice dentistry; that appeal was dismissed by Florida's First District Court of Appeals on June 7, 2007.

7. The Notice of Hearing and Complaint in this matter were properly served on the Respondent by certified U.S. Mail on June 12, 2008, to the last address of record for the Respondent on file with the Department.

8. The U.S. Mail Return Receipt shows that Respondent accepted delivery of the Notice of Hearing and Complaint on June 17, 2008.

9. Respondent did not file an Answer to the Complaint and did not appear at the hearing which was held in this matter on July 29, 2008.

### **CONCLUSIONS OF LAW**

1. The Dentistry Examining Board has jurisdiction in this matter pursuant to Wis. Stat. § 447.04 and Wis. Admin. Code § DE 5.02(14).
2. The Respondent's conduct as described in Findings of Fact 4-6 herein, constitutes a violation of Wis. Admin. Code § DE 5.02 (14) as it is unprofessional conduct for a dentist to engage in the conduct described therein and to have a license granted by another state to practice as a dentist revoked.
3. By failing to file an Answer to the Complaint and failing to appear at the hearing held in this matter, the Respondent is in default under Wis. Admin. Code § RL 2.14.

### **ORDER**

**NOW, THEREFORE, IT IS ORDERED** that the license of James M. D'Amico, D.D.S., to practice as a dentist in the state of Wisconsin (#5001683-15) shall be, and hereby is **REVOKED**.

**IT IS FURTHER ORDERED** that the full assessable costs of this proceeding be imposed upon James M. D'Amico, D.D.S., pursuant to Wis. Stat., § 440, 22.

### **OPINION**

This matter was commenced by the filing of a Notice of Hearing and Complaint on June 11, 2008. A Class 2 disciplinary hearing was held in this matter on July 29, 2008. Attorney James Polewski appeared on behalf of the Division of Enforcement. The respondent, James M. D'Amico, D.D.S., did not file an Answer to the Complaint and did not appear at the hearing and did not make any contact with the Department of Regulation and Licensing, the Division of Enforcement or the Administrative Law Judge prior to, during or after the hearing.

#### **I. Applicable Laws**

Wis. Stat. § 447.07(3)(a) provides that the Dentistry Examining Board may, without further notice or process, limit, suspend or revoke the license or certificate of any dentist or dental hygienist who engages in unprofessional conduct.

Wis. Admin. Code § DE 5.02(14) provides that unprofessional conduct by a dentist or a dental hygienist includes having a license, certificate, permit, or registration granted by another state to practice as a dentist or dental hygienist limited, suspended or revoked, or subject to any other disciplinary action.

## **II. Analysis**

The Division of Enforcement alleges that the Respondent violated the rules of professional conduct for dentistry as a result of the revocation of his dental license by the Florida Board of Dentistry. The Florida order was based upon incidents of unprofessional conduct; specifically, patient abandonment, fraud, improper dental treatment, negligent dental treatment and failure to maintain patient documentation. It is unprofessional conduct within the meaning of Wis. Admin. Code § DE 5.02 (14) to have a license, certificate, permit, or registration granted by another state to practice as a dentist limited, suspended or revoked or subject to any other disciplinary action.

By failing to file an Answer to the Complaint and failing to appear at the hearing held in this matter, the Respondent forfeited his right and opportunity to present any mitigating evidence in this matter regarding the circumstances surrounding his discipline by the Florida Board of Dentistry or his subsequent efforts, if any, toward rehabilitation or remediation of his dental practice. Under s. RL 2.14 of the Wisconsin Administrative Code, a Respondent who fails to answer a complaint or fails to appear at a hearing is in default and the disciplinary authority may make findings and enter an order on the basis of the Complaint and other evidence.

The evidence shows that the Complaint and Notice of Hearing were properly served on the Respondent by certified U.S. Mail on June 12, 2008, to the last address of record for the Respondent on file with the Department. The postal return receipt shows that Respondent accepted delivery of the Complaint and Notice of Hearing on June 17, 2008. The record evidence further shows that the Respondent did not file an Answer to the Complaint or make any contact whatsoever with the Department, the Division of Enforcement or the Administrative Law Judge in regard to this proceeding.

## **III. Appropriate Discipline**

The Division of Enforcement has requested that the Dentistry Examining Board revoke the Respondent's license to practice dentistry in order to protect the safety and welfare of the public in this state. The Division argues that the Respondent's failure to participate in this disciplinary process or to respond in any way indicates a lack of professional demeanor, candor and responsibility commensurate with the practice of dentistry. The Division further argues that the Respondent's lack of cooperation makes the imposition of full costs assessed in this proceeding reasonable and necessary. Based upon the allegations forming the basis for the requested discipline in this case, and given the failure of the Respondent to appear or provide any evidence in this proceeding, it is also the recommendation of this Administrative Law Judge that the Dentistry Examining Board adopt the proposed disciplinary requests.

It is well established that the objectives of professional discipline include the following: (1) to promote the rehabilitation of the licensee; (2) to protect the public; and (3) to deter other licensees from engaging in similar conduct. *State v. Aldrich*, 71 Wis. 2d 206, 209 (1976). Punishment of the licensee is not an appropriate consideration. *State v. McIntyre*. 41 Wis. 2d 481, 485 (1969). There is nothing in the record to suggest that imposing any discipline short of revocation would protect the public, have a rehabilitative effect on the respondent, or deter other licensees from engaging in similar conduct.

By his failure to both answer the Complaint and to appear at the evidentiary hearing, the Respondent has effectively, and legally, admitted all of the allegations contained in the Complaint. Moreover, the Respondent's unresponsiveness and his lack of cooperation suggest that he is not interested in being rehabilitated at this time. By revoking his license, the Dentistry Examining Board will prevent the Respondent from engaging in dental practice in this state and thereby ensure that he will not pose a risk or threat to the public safety and welfare. Revocation of the Respondent's license will also serve to deter others from engaging in similar conduct. Consequently, revocation is an appropriate imposition of discipline and will act as sufficient means of safeguarding the public.

#### **IV. Assessment of Costs**

In addition to the discipline to be imposed against the Respondent's license, the regulatory authority may assess all or a part of the costs of the proceedings against the Respondent. Wis. Stat. § 440.22(2), provides as follows:

In any disciplinary proceeding against a holder of a credential in which the department or an examining board, affiliated credentialing board or board in the department orders suspension, limitation or revocation of the credential or reprimands the holder, the department, examining board, affiliated credentialing board or board may, in addition to imposing discipline, assess all or part of the costs of the proceeding against the holder. Costs assessed under this subsection are payable to the department.

This Administrative Law Judge recommends that the Dentistry Examining Board apply its discretion to the circumstances of this proceeding and impose the full costs of the proceeding against the Respondent. This recommendation is based upon the analysis used by the Wisconsin Supreme Court in disciplinary proceedings against disciplined attorneys, *see* Supreme Court Rule 22.24 (1m). The Court's rule lists several factors to be considered, including:

- 1) The number of counts charged, contested, and proven;
- 2) The nature and seriousness of the misconduct;
- 3) The level of discipline sought by the parties;
- 4) The respondent's cooperation with the disciplinary process;
- 5) Prior discipline, if any;
- 6) The fact that the Department of Regulation and Licensing is a "program revenue" agency, whose operating costs are funded by the revenue received from licensees, and the fairness of imposing the costs of disciplining a few members of the profession on the vast majority of the licensees who have not engaged in misconduct; and
- 7) Any other relevant circumstances.

Under the circumstances involved in this proceeding, it is reasonable to assess the full costs of this proceeding against the Respondent. The Respondent was disciplined by another licensing jurisdiction for unprofessional conduct in the practice of dentistry. The Florida Board of Dentistry discipline was based upon numerous incidents affecting the health, safety and welfare of the Respondent's patients. The level of discipline was the revocation of the Respondent's license to practice as a dentist, one of the most serious disciplinary outcomes. When this proceeding was commenced by the Division of Enforcement, after notification of the disciplinary action in Florida, the Respondent chose not to cooperate; failed to file an answer to the Complaint and failed to appear at the hearing.

Additionally, the imposition of full costs of the proceeding against the Respondent is appropriate because the Department of Regulation and Licensing is a "program revenue" agency which means that its operations are funded by license fees fixed proportionately to the costs attributable to the regulation of each profession. It is fundamentally unfair to shift the costs of prosecuting a few members of the profession to the vast majority of the licensees who have not engaged in

misconduct. The Respondent has only himself to blame for majority of the costs associated with this action and he should bear them in full. To the extent that unprofessional conduct by a licensee is found to have occurred following an evidentiary hearing, the prevailing view is that the licensee should bear the costs of the proceeding.

Based upon the record evidence submitted at hearing, the Administrative Law Judge recommends that the Dentistry Examining Board adopt as its final decision in this matter, the proposed Findings of Fact, Conclusions of Law and Order as set forth herein.

Dated this \_\_\_\_\_ day of December, 2008.

Respectfully submitted,

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Colleen M. Baird  
Administrative Law Judge